

Van Schaik



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kilgore Corporation
File: B-235813.2
Date: November 7, 1989

DIGEST

Consideration of quality as an aspect of an evaluation of proposals is not required by the 1987 National Defense Authorization Act and its implementing regulation; statutory and regulatory language and legislative history indicate that use of quality as a technical evaluation criterion is permissive, not mandatory.

DECISION

Kilgore Corporation requests reconsideration of our decision, Kilgore Corp., B-235813, June 19, 1989, 89-1 CPD ¶ 576, in which we dismissed Kilgore's protest of the award of a contract to Maryland Assemblies, Inc., under request for proposals (RFP) No. DAAA09-88-R-1056, issued by the Army for signal flares. We affirm our prior decision.

In its protest, Kilgore argued that the Army improperly awarded the contract based solely on the awardee's lower price without considering technical factors. Kilgore argued that since the RFP evaluation scheme stated that evaluation of offers would be based, "among other factors, upon the total price quoted for all items," the Army was required to consider, in addition to price, other factors such as technical excellence, management capability, prior experience and past performance. Kilgore argued that Federal Acquisition Regulation (FAR) § 15.605(b) requires that "quality" be an evaluation factor in every negotiated procurement and thus should have been a factor under this solicitation.

In dismissing the protest, we stated that FAR § 15.605(b) simply explains how quality may be evaluated when it is to be considered and does not per se require the evaluation of quality. Finally, we stated that if Kilgore believed that the RFP should have provided for award based on specific technical factors in addition to price, it was required to

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so allege before the time for receipt of initial proposals and that, since Kilgore protested only after award, such an allegation was untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989).

Kilgore does not question our dismissal of its protest but requests that we clarify our decision. Specifically, Kilgore argues that we misinterpreted FAR § 15.605(b) That provision states in part:

"The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition officials. However, price or cost to the Government shall be included as an evaluation factor in every source selection. Quality also shall be addressed in every source selection. In evaluation factors, quality may be expressed in terms of technical excellence, management capability, personnel qualifications, prior experience, past performance, and schedule compliance."

This FAR language was adopted in response to 10 U.S.C. § 2305(a)(3) (1988), which was enacted by section 924 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661. The statutory provision states:

"In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency shall clearly establish the relative importance assigned to the quality of the services to be provided (including technical capability, management capability, and prior experience of the offeror)."

In our view, 10 U.S.C. § 2305(a)(3) does not mandate that quality be included as an evaluation factor in every solicitation for competitive proposals. Although the provision refers to "each solicitation for competitive proposals," the rest of the provision, dealing with the "services to be provided," obviously applies to solicitations for services and to solicitations leading to the award of supply contracts, such as we have in this case. Moreover, since nothing requires that quality be assigned any particular weight as an evaluation factor, we think it is clear that the provision only requires that solicitations state the relative importance of quality when quality is used as an evaluation factor. This view is supported by the legislative history of the provision. The Senate Armed

Services Committee, in S. Rep. No. 331, 99th Cong., 2nd Sess. 266-267 (1986), stated in regard to this provision that "in procuring sophisticated professional and technical services, it is essential that quality of the service be given appropriate weight related to cost and price factors." The Committee further stated that it was adding a new section to the law to "recognize the importance of quality as a factor in professional and technical services procurement. This amendment will clarify the law to indicate such priority for quality is permissible." Thus, we think its clear from the provision and its legislative history that it applies only to solicitations for services and that giving quality substantial evaluation weight in such solicitations is not mandatory but rather is a matter within the discretion of the contracting agency.

Since the 1987 National Defense Authorization Act did not mandate that quality be listed as an evaluation factor in every solicitation, we do not believe that it is reasonable to conclude that the language in amended FAR § 15.605(b) requires more. In fact, a careful reading of the FAR language establishes that it does not. The FAR requires only that quality be "addressed" in each source selection, and specifies how quality may be addressed when it is encompassed by evaluation factors. There is no requirement that quality actually be an evaluation factor or an element of one in every case. In cases where it is not, the regulation is satisfied, and quality is "addressed," simply by the requirement that the prospective awardee's qualification to perform the contract be established in a responsibility determination prior to award.^{1/} See FAR Subpart 9.1.

The decision is affirmed.


James F. Hinchman
General Counsel

^{1/} The protester has cited in support of its position a March 15, 1987 memorandum from the Director of the Defense Acquisition Regulatory Council to the Chairman of the Civilian Agency Acquisition Council which states that the Act required the "specific consideration of quality as an evaluation factor." Not only do we not agree with the memorandum's conclusion, but we also note the subsequently issued FAR does not include clear language containing such a requirement.